FOR ARGUMENT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-804

JOY A. FARMER, Special Administrator of the Estate of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, et al.,

Defendants-Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In his opening brief, Petitioner sought to establish that the protracted campaign of vilification, harrassment and referral discrimination carried on against him by Respondents

so little touched the matters with which Congress was principally concerned when it enacted the Labor-Management Relations Act that to permit a lawsuit founded on that misconduct could scarcely frustrate the National Labor Relations Board's effectuation of any of Congress' central purposes. To that end, Petitioner examined in detail the legislative history of the Labor-Management Relations Act and the Labor-Management Reporting and Disclosure Act, and exhaustively explored the policies underlying the rule of federal labor law preemption announced in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) and the several exceptions thereto. Petitioner argued in addition that if his claim came within none of the mentioned exceptions, considerations both of fundamental fairness and of public policy required re-examination of the Garmon doctrine, at least as it is applied in the area of union-member disputes.

The brief which Respondents have filed in reply relies largely on the technical complexities of existing preemption law, and avoids the policy considerations and issues of legislative intent which Petitioner had thought paramount. If that were all, it would require only a perfunctory response. Unfortunately, it also seriously misconceives a number of issues, the law and much of Petitioner's argument, necessitating a somewhat more elaborate answer.

The AFL-CIO and the National Labor Relations Board have both filed amicus curiae

briefs in support of Respondents' position. The arguments advanced in those briefs largely parallel Respondents' contentions, and will be dealt with in the course of Petitioner's reply thereto.

II

ARGUMENT

A. RESPONDENTS' ASSERTION THAT THE JUDGMENT IS NOT FINAL IS FOUNDED ON A MISUNDERSTANDING OF PETITIONER'S POSITION AND OF THE APPLICABLE LAW.

Respondents argue preliminarily that because Petitioner has indicated that a continuing dispute exists as to the status of three causes of action to which Respondents successfully demurred in the trial court, the judgment here under review is not final (Resp. Br., pp. 21-27). This contention misconceives Petitioner's position and is in any event legally meritless.

1. The judgment herein was entered upon a verdict on one of four causes of action stated in Petitioner's First Amended Complaint [CT 570-571; App. 67-69]. The judgment did not in any way purport to dispose of the three causes of action to which Respondents' demurrer had been sustained. The effect of this omission was, at least theoretically, to render the judgment nonappealable, since California's courts, unlike the federal courts, adhere without exception to the "one final judgment" rule, under which judgments on individual causes of action against the same defendants in the same lawsuit may not be separately appealed. (Cf. U. S. Financial v. Sullivan, 38 Cal.App. 3d 5, 11, 112 Cal.Rptr. 18 (1974) and cases there cited with Cold Metal Process Co. v. U.S. Eng. etc. Co., 351 U.S. 445 (1956); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956); Reeves v. Beardall, 316 U.S. 283 (1942); Rule 54(b), Fed. Rules of Civ. Proc.) An appeal from a judgment involving fewer than all causes of action between the same parties is regarded under California law as jurisdictionally defective and it follows that such a defect may be raised at any stage of the appellate process. (Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100 (1939); Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174 (1936).

Neither side herein noticed the mentioned defect in the judgment and the appeal was briefed and argued in the Court of Appeal as if the defect did not exist. The Court of Appeal itself missed the defect and was evidently of the belief that the

judgment covered all causes of action. (See Petition for Writ of Certiorari, p. A-2, fn. 2.) It was not until Petitioner undertook to obtain a hearing in the California Supreme Court that the defect was discovered.

As is revealed in the passage quoted by Respondents from the Petitioner's Petition for Hearing (see Resp. Br., pp. 22-23), Petitioner was initially of the view that the defect was so fundamental that the decision of the Court of Appeal was an utter nullity and that even if hearing were denied, the Court of Appeal's decision would still be subject to collateral attack.

Following denial of his Petition for Hearing, however, sober reflection on the effect of denial of hearing[1/] led Petitioner to conclude that both as a practical matter and as a

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1/ Denial of hearing by the California Supreme Court is unlike denial of certiorari by this Court. Denial of hearing indicates not just that there were insufficient votes for hearing but that the California Supreme Court approves the result, if not necessarily the reasoning, embodied in the decision of the Court of Appeal. (DiGenova v. State Board of Education, 57 Cal.2d 167, 18 Cal.Rptr. 369, 367 P.2d 865 (1962); Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617 (1924); Gustafson, Some Observation on California's Courts of Appeal, 19 UCLA L.Rev. 167, 170-177 (1971).)

matter of law the cause of action which had been reduced to judgment had been finally determined and was beyond challenge so far as California's courts were concerned, despite the "one final judgment" rule. On that basis, Petitioner sought certiorari from this Court. Obviously, if Petitioner had continued to believe as he did at the time of the Petition for Hearing, he would not have deemed it necessary or appropriate to come to this Court for such relief. Having thus in good faith invoked this Court's jurisdiction, Petitioner has no intention whatsoever of attempting a collateral attack upon the judgment here under review should this Court affirm it, Respondents' dire warnings (Resp. Br., pp. 23, 27) notwithstanding.

2. But the conclusion that the judgment ment is final as to the one cause of action now before this Court does not dispose of the remaining causes of action. Quite the contrary, a necessary implication of the California Supreme Court's denial of hearing is that, despite Petitioner's prior belief, the judgment entered on the one cause of action permitted to go to trial was in fact separately appealable; and from this it necessarily follows that the sustaining of the demurrer to the remaining causes of action, if and when a judgment of dismissal is entered upon that ruling, will also be separately appealable, despite the "one final judgment" rule. Obviously, nothing about this conclusion is in any way inconsistent with Petitioner's position that the judgment now before this Court is final. In fact, the situation is essentially the same as when a Federal District Court certifies a

severable claim for separate appeal under Rule 54(b) of the Federal Rules of Civil Procedure. The judgment upon the claim so certified is final for purposes of appeal even though the remaining claims are still to be disposed of.

3. Respondents cite and principally rely upon two cases, Cox Broadcasting Corp. v. Cohn, 420 U.S. 419 (1975) and Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) in support of their contention that the judgment lacks finality. Those decisions, however, and the several earlier decisions which they discuss are concerned with a very different kind of situation from that presented here. In those cases, interlocutory rulings were sought to be brought before this Court prior to determination of all issues necessary to a final judgment disposing of a single and basically indivisible claim for relief. The danger feared in each of those cases was that the proceedings yet to be completed would render moot this Court's decision on the interlocutory ruling, or that the remaining proceedings would engender further federal questions requiring a second review by this Court. Here, what is involved is not an interlocutory ruling in a single unseverable controversy not as yet reduced to judgment, but a final decision on one of several distinct (and, as the California Supreme Court's denial of hearing indicates, severable and severally appealable) claims for relief. Any further proceedings respecting the causes of action not included in the present judgment would involve only those causes of action. Those proceedings, if any, would remain utterly separate and apart from such further

proceedings as this Court's decision herein might necessitate in the Court of Appeal. There is not the slightest chance that anything that might be decided with regard to the remaining causes of action would render moot the decision reached herein. And to the extent that the remaining causes of action present the possibility of further federal questions requiring further decisions by this Court, they are no different from the claims remaining for subsequent adjudication when a judgment is entered on fewer than all of the claims in a lawsuit and an immediate appeal is taken therefrom under Rule 54(b).

4. It might be added that Petitioner is not so set upon pursuing the remaining causes of action that he would suffer dismissal of the writ of certiorari in order to enjoy that privilege. Thus, if despite the foregoing considerations, this Court has any doubt that the continuing dispute over the remaining causes of action affects the finality of the judgment here for review, Petitioner will stipulate to any adverse disposition of those causes of action which this Court may require.

B. THE KIND OF MISCONDUCT INVOLVED HERE IS IN FACT ONLY DISTANTLY RELATED TO THE MAIN CONCERNS OF THE LABOR MANAGEMENT RELATIONS ACT. IN MAINTAINING OTHERWISE, RESPONDENTS HAVE MISCONSTRUED BOTH PETITIONER'S ARGUMENTS AND THE APPLICABLE LAW.

In his Opening Brief, Petitioner discussed at length the several ways in which a case arising under state law of general application, as this one did, may come within the literal terms of the Garmon principle. He demonstrated that unlike cases involving actually or arguably protected conduct, this case -- to which the Garmon principle applies, if at all, only to the extent that the case involves clear violations of the Labor-Management Relations Act or to the extent that the Board only arguably has the authority to prohibit the conduct in question -- presents few of the risks of conflict that the Garmon formula was designed to avoid (Pet Op. Br., pp. 39-48).

Petitioner was also at pains to show that while the Board and the Courts may have concluded that a portion of the conduct herein is within Board jurisdiction, most of that conduct -- discrimination in hiring hall referrals directed

at one already a union member, occurring in an already securely organized industry, and involving motivations which went far beyond "encouragement" or "discouragement" of union "membership" under even the most expansive construction which might be given Section 8(b)(2) -- was not among the varieties of conduct which Congress in enacting the Labor-Management Relations Act had particularly intended to single out for Board regulation (Pet. Op. Br., pp. 22-33, 48-51).

On the foregoing grounds, Petitioner urged that this case ought to be deemed within the recognized exception to the Garmon principle for matters peripheral to the scheme of labor relations regulation embodied in the Labor-Management Relations Act (Pet. Op. Br., pp. 54-72).

Respondents have made no reasoned reply to Petitioner's discussion of the legislative history of the Labor-Management Relations Act and of the policies sought to be served by the Garmon formula. They bottom their case primarily on the authority of Plumbers Union v. Borden, 373 U.S. 690 (1963), assuming, without ever troubling to show why, that a mindlessly literal and wooden application of the Garmon rule to cases like this one is somehow necessary to the Board's effective implementation of federal labor policy, no matter how remote the conduct in question may be from the main purposes of the Labor-Management Relations Act. And they urge, again without suggesting any good reasons for their view, that the recognized exception for matters of only peripheral concern to the federal scheme of labor

relations regulation should be narrowly construed and applied, even to the point of rendering the exception meaningless (Resp. Br., pp. 33-60).

A number of the points raised by the Respondents in support of their position require comment.

1. While not disputing Petitioner's analysis of the policies sought to be served by the Garmon formula, Respondents purport to dispute Petitioner's position that none of the misconduct of which the jury found Respondents guilty was federally protected (Resp. Br., pp. 37-38). The Board joins them in this contention (NLRB Br., pp. 28-33).

On closer examination, however, Respondents' and the Board's quarrel with Petitioner is not that they believe there is any possible ground on which the misconduct in which the jury found Respondents had engaged could be deemed protected. Indeed, since the jury could hardly have found Respondents' conduct outrageous if it accepted Respondents' claim that they either had not discriminated against Petitioner at all or, if they had, they were justified in doing so by Petitioner's own behavior, the verdict necessarily negatives the facts on which it is urged that the Board might have determined Respondents' conduct to be protected. Instead, it is the apparent position of Respondents and the Board that had Respondents' very different version of the facts been accepted, there then would have existed a basis on which Respondents' conduct might have been

deemed protected.

But this is simply another way of saying that the Board might have resolved the disputed issues of fact differently than did the jury. There is of course no indication that the Board would in fact have done so, and its determination regarding the one portion of the continuing course of misconduct which was submitted to it suggests that it would not. 2/ More to the point, the bare possibility that the Board might make different findings of fact than the jury represents a far less serious threat to the federal scheme of labor relations regulation than state prohibition of federally protected conduct, such as Respondents and the Board suggest, but fail to establish, was involved here. The instant case is thus quite different from Borden in this respect, not identical to it as Respondents indicate (Resp. Br., pp. 37-38). While Borden does advert to contested issues of fact, the crucial issue there was one of policy, not fact: whether the union's procural of what amounted to a discharge in an attempt to enforce a union rule forbidding members from directly soliciting their own jobs should be regarded as protected or prohibited.

2/ Professor Archibald Cox regards the possibility of different findings of fact "inconsequential" in this context. (Cox, Labor Law Preemption Revisited, 85 Harv. L.Rev. 1337, 1374 (1972).)

It might be added that to the extent that Respondents and the Board suggest that a difference in result was rendered somehow more probable because the problems inherent in the operation of hiring halls are complex and because the jury lacked the Board's expertise as to such matters (see Resp. Br., pp. 37-38; NLRB Br. pp. 33-34) they mistake the nature of the function performed by the jury and they misconceive the source of the complexity which characterized the trial herein. While the trial was certainly lengthy and the evidence voluminous, that fact reflected not any particular complexity in the rules governing operation of the hiring hall but rather the fact that Petitioner was forced to wring much of his evidence from hostile witnesses and to subject those witnesses to extensive cross examination in order to reconcile the numerous inconsistencies in their account of Respondents' hiring hall rules and the manner in which those rules were applied to Petitioner. Sitting through Petitioner's attempts to elicit what turned out to be rather simple facts required of the jury more than a little patience, but understanding the evidence and determining who was lying and who was telling the truth hardly required of it any of the special expertise which the Board says it could have brought to the problem. Furthermore, since the jury tested Respondents' conduct against state tort law and not federal labor relations law, its lack of familiarity with federal labor policy can hardly have hampered its deliberations.

2. According to Respondents, this case comes within Plumbers Union v. Borden, supra, because (a) most of the conduct in issue involved hiring hall discrimination, (b) that conduct had as its purpose the "encouragement" or "discouragement" of union "membership" as Congress intended those terms to be construed, and (c) in any event Petitioner actually demonstrated the conduct herein to be subject to Board regulation by filing a successful unfair labor practice charge based on one act of direct job interference (Resp. Br., pp. 36-37).

No portion of this argument can withstand close scrutiny.

a. To begin with, what Respondents characterize as "hiring hall discrimination" in Borden involved more than mere refusal of a job referral. Since the employee there had actually been promised a job by an employer, the discrimination took the form of direct interference with an existing employment relation. This kind of job interference -- tantamount to a union procured discharge -- closely resembled the job interference that the proponents of Section 8(b)(2) had expressly and specifically indicated they wished to prohibit, even if only as a matter incidental to the section's main purpose. (See Pet. Op. Br., pp. 28-29; see also NLRB Br., pp. 19-20.) Here, on the other hand, the hiring hall discrimination consisted, with one exception, of simple refusal of job referrals and not an interference with any such existing employment relation.

As Petitioner attempted to show in his opening brief, this is more than a distinction without a difference. For while it is abundantly clear from the legislative history of Section 8(b)(2) that Congress intended thereby to prevent unions from urging or forcing closed shop agreements upon employers and also from causing employers with whom they might enter into maintenance of membership agreements to fire expelled union members, it is by no means apparent that Congress intended to commit to Board regulation the actual operation of hiring halls and it is even less clear that it meant the Board to monitor referral discrimination aimed at a member and occurring not in the course of an organizing effort but long after the union had become firmly entrenched as exclusive bargaining representative (Pet. Op. Br., pp. 25-29). A similar conclusion flows from the language of Section 8(b)(2) itself. Section 8(b)(2) literally proscribes not union discrimination as such but union efforts to cause an employer to discriminate.[3/] Moreover, the section sepcifically proscribes union instigated employer discrimination

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3/ This Court expressly so recognized in International Association of Machinists v. Gonzales, 356 U.S. 617, 622 (1958), when it said that the suit therein

> "did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil which the Board is concerned to

(con't p. 16)

following termination of membership, the precise evil to which the section's proponents adverted in debate. On the other hand, it is only by a somewhat strained interpretation of the section's language that it can be applied at all to such unilateral union conduct as discrimination in hiring hall referrals, since the employer is involved therein only to the extent that he has allowed the union to act as his agent for the purpose of selecting new employees.

It may well be that the foregoing view is contrary to the conventional wisdom on the subject, but it is significant that neither Respondents nor amici curiae, despite their claim that Congress intended to subject hiring halls to minute regulation (Resp. Br., pp. 44-49; NLRB Br., pp. 19-23, 33; AFL-CIO Br., pp. 31-41), have been able to point to any portion of the legislative history which provides any solid substantiation of the conventional wisdom. Indeed, the portions of the legislative history cited by the Board only confirm Petitioner's view.

3/ (con't from p. 15)
strike at as an unfair labor practice under Section 8(b)(2)."
The Gonzales Court further described Board proceedings conducted under Section 8(b)(2) as "looking principally to the nexus between union action and employer discrimination. . . ." (Id., at p. 623.)

In lieu of legislative history, Respondents rely on this Court's decisions in Radio Officers v. NLRB, 347 U.S. 17 (1954), Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 195 (1961) and Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) and characterize Petitioner's position as an "ill disguised attack" on Radio Officers (Resp. Br., pp. 44-48. Amici curiae take a similar position (NLRB Br., pp. 20, 22, 35; AFL-CIO Br., pp. 31-41). But those decisions neither establish that Congress intended the Board to correct the kind of abuse involved here nor do they even reflect this Court's considered judgment that the Board should have that power, and it is not in any event Petitioner's purpose to urge their abandonment.

As to Radio Officers, none of the three cases there decided involved hiring hall discrimination at all. While only one (Radio Officers) involved actual loss of a job, all the involved acts of discrimination on the part of the employer directed toward a person or persons already employed by him and undertaken at the urging of a union. The discrimination in each case thus came within the express prohibitions of Section 8(b)(2).

Phelps Dodge held simply that an employer discriminates in regard to hire no less when he refuses to emply a union member than when he terminates a member because of union membership. Since Phelps Dodge had nothing to do with union attempts to cause or attempt to cause an employer to discriminate in violation of Section 8(a)(3) that decision cannot be read as

deciding that when a union unilaterally denies one of its members a job referral, it violates Section 8(b)(2). Because Section 8(b)(2) forbids not direct union discrimination but rather attempts by unions to cause discrimination by employers, the correspondence which Respondents and the AFL-CIO maintain exists between Section 8(b)(2) and Section 8(a)(3) is too inexact to justify the conclusion that "Congress subjected unions to the same restrictions as employers" and therefore that "it necessarily subjected union operated hiring halls to regulation." (Resp. Br., p. 46; see also AFL-CIO Br. pp. 36-38.)

Teamsters Local 357 comes nearest supporting Respondents' position, since it contains language suggesting that hiring hall discrimination intended to encourage or discourage union membership may be reached by the Board (356 U.S., at pp. 676-677). But it is noteworthy that the language so indicating was essentially dictum and that the Board's power to redress hiring hall referral discrimination had not been an issue in the case. The incident out of which that case arose was the union procured discharge of a member who obtained a job directly from an employer with whom the union had entered into an exclusive hiring hall agreement. The issue was whether the Board could invalidate that agreement and declare unlawful union and employer conduct in conformance with it simply because it lacked affirmative antidiscrimination provisions. It is noteworthy as well that the Court's language went beyond that of the statute, for as already

indicated, Section 8(b)(2) does not in terms apply to direct or unilateral union discrimination. And most particularly is it worth observing that the Court expressly recognized Congress' very limited concern with regulation of hiring halls, pointing out that Congress' central aim was to prevent their use as an adjunct of the closed shop (356 U.S., at pp. 673-674).[4/]

Petitioner must again emphasize as he did in his Opening Brief (p. 72) that he has no dispute with the foregoing authorities even to the extent that they may expand the Board's regulatory jurisdiction beyond what Congress specifically contemplated when it enacted the Labor-Management Relations Act. Nor does Petitioner have any desire to roll back the body of Board law which purports to follow and apply those authorities. (See NLRB Br., pp. 30-33, 51-61.) Indeed, as Petitioner has learned from bitter personal experience, the worker whose

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4/ To the extent that it purports to find in Section 8(b)(2) a mandate for Board regulation of unilateral union discrimination, Teamsters Local 357 represents an apparent departure from the construction given Section 8(b)(2) in International Association of Machinists v. Gonzales, supra, 356 U.S. 617, discussed in footnote 3, supra. It is likewise to that extent inconsistent with Radio Officers, which also reveals a clear sense that it is discrimination carried out by an employer at union behest which Congress intended Section 8(b)(2) to reach (347 U.S. at p. 42).

union has turned on him needs help from anyone who offers it. Moreover, particularly if the courts are to be ousted of all jurisdiction over cases as to which Board jurisdiction is only arguable, simple justice requires that the Board conscientiously exercise all of the power it even arguably may lay claim to.

Petitioner's point is not that wise policy militates against or that the terms of the Labor-Management Relations Act preclude Board regulation of the operation of hiring halls. Statutes are frequently construed and applied in ways which were not within the specific contemplation of their framers. Rather, Petitioner seeks only to establish that in light of the wording of Section 8(b)(2) and the virtual silence of the section's legislative history regarding the regulation of the operation of hiring halls, it is questionable whether Congress regarded such regulation as essential to the effective regulation of the process of employee self-organization and collective bargaining which was Congress' primary concern. This point will receive further consideration below.

b. Whatever Congress may have intended with respect to regulation of hiring halls, it is open to dispute whether the discrimination herein "encouraged" union "membership" even as those terms are broadly defined in Radio Officers.[5/] Petitioner will not elaborate here

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5/ See p. 21.

his reasons for believing that the motivation for Daley's conduct toward him was predominantly personal animosity even if the animosity originally grew out of political rivalry.[6/] To the extent that its motivation was personal

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5/

It might be observed that Radio Officers' expansive definition of the term "membership" as used in Section 8(b)(2) -- a definition which reflects a broad conception of Section 7 rights (347 U.S., pp. 39-40) -- is difficult to square with the narrow construction given Section 8(b)(1)(A) in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 179-195 (1967). There, Section 8(b)(1)(A)'s prohibition of coercion or restraint of employees in the exercise of their Section 7 rights was held to refer primarily to intimidation occurring in the course of organizing campaigns, a view necessarily implying a limited conception of Section 7.

6/

Respondents maintain that Petitioner both misstates the record and contradicts himself in urging (see Pet. Op. Br., pp. 50-51) that Daley's misconduct necessarily evidenced personal animosity which extended far beyond mere union considerations and which thus placed much of the conduct at the very periphery of the zone of behavior which Congress meant to commit to Board control (Resp. Br., p. 38). As is true, however, with Respondents' various other claims of inconsistency in Petitioner's positions

(con't. p. 22)

hatred, the conduct obviously cannot have been intended to encourage union membership. A similar conclusion follows even if Daley's conduct was essentially in reprisal for Petitioner's political opposition to him, as Respondents insist (Resp. Br., pp. 38, 59-60). While the Board has concluded that Radio Officers authorizes it to reach conduct springing from such motives (NLRB Br., pp. 31-32) the legislative history is far from conclusive on the question[7/] and a union official who persecutes a political

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6/ (Con't. from p. 21.)
(Resp. Br., pp. 39-40, 44, 50, 61, 70) the assertion that Petitioner has contradicted himself flatly ignores Petitioner's clear meaning, as an examination of the positions said to be inconsistent will reveal. With respect to Petitioner's purported misstatement of the record, it is sufficient to point out that Respondents do not cite any portion of the record supporting a view contrary to that expressed by Petitioner.

7/
The Board in its brief provides only a single citation to the legislative history (see 2 Leg. Hist. of LMRA, p. 1062) indicating any intent to protect members against reprisals for political opposition to union leaders (NLRB Br., p. 21). Typically, even this portion of the legislative history refers to a discharge under a closed shop agreement following expulsion from the union.

rival cannot be said to have as his purpose the encouragement even of membership in good standing in the same sense as an official who imposes sanctions for an asserted breach of union rules, such as occurred in Borden and in Radio Officers.

c. How absolute and inflexible is Respondents' reading of Borden is nowhere revealed so clearly as in their contention that the one incident of direct interference with a job already promised to and all but possessed by Petitioner, for which the Board did allow a partial remedy, conclusively establishes the crux of the action, despite the fact that this one incident was a small part of the whole and despite the fact that the rest of Respondents' conduct was in significant respects very different from this single incident (Resp. Br., pp. 38-39). Respondents suggest that such a view as to the crux of the action is dictated by the presumption, developed in an entirely different context and for an entirely different purpose, that a verdict which might have been based on evidence improperly placed before the jury was in fact so based. This argument, of course, assumes the answer to the issue: whether any conduct which may be indisputably within the Board's jurisdiction is sufficient to taint all other conduct involved in the action, or whether the crux of the action is to be ascertained by examining the character of the major portion of the conduct.

Respondents further urge with respect to the single incident of direct job interference which resulted in a Board award that Petitioner's having sought and obtained a jury instruction to the effect that the Board had given him only back wages and could not redress other harms flowing from the incident somehow constituted reliance on Board law. This purported reliance is said to have been prompted by Petitioner's desire to use the Board's favorable determination to his advantage in this lawsuit and is represented as being so thoroughly at odds with the position Petitioner has taken on appeal that Petitioner should be estopped to claim that this one incident does not conclusively fix the crux of the action (Resp. Br., pp. 39-40). As is apparent, however, from a reading of the entire instruction [CT 533, App. 41-42] the purpose of the instruction was to indicate to the jury that the back pay awarded was at best incomplete relief, and that Petitioner had not already been made whole either with respect to that incident or as to the entire course of conduct at issue. Moreover, it is and has always been Petitioner's position not that this one incident did not constitute prohibited conduct but that the remainder of the conduct, which did not entail interference with an existing or promised job and which went on for so long as to call in question whether it sprang from primarily union considerations, could not automatically be so characterized. That position does not involve reliance on Board law in anything like the sense suggested by Respondents.

3. Respondents challenge Petitioner's reliance on International Association of Machinists v. Gonzales, 356 U.S. 617 (1958), cited in Garmon as an application of the exception to the preemption doctrine for matters of only peripheral federal concern (Pet. Op. Br., pp. 63-83). Gonzales is said to be distinguishable on the basis that although the expelled member there involved also sought damages for lost wages resulting from post-expulsion hiring hall discrimination, the crux of his action was restoration of his status in the union, a purely internal union matter, while the crux of this case, as in Borden, Iron Workers Union v. Perko, 373 U.S. 601 (1963) and Motorcoach Employees v. Lockridge, 403 U.S. 274 (1971) was interference with employment relations (Resp. Br., pp. 41-43). The Board advances a similar argument in its brief (NLRB Br., pp. 39-42).

This distinction, however, is simply unworkable, notwithstanding the fact that it has its origins in Borden, Perko and Lockridge. For while it may be true that the state courts in Borden and Perko awarded only damages and not restoration of membership rights, the state court in Lockridge, like that in Gonzales, awarded both. It can therefore hardly be said that Lockridge concerned internal affairs any less than did Gonzales. Moreover, Gonzales obviously did involve matters of employment, so that it cannot be said that that action was focussed solely upon the plaintiff's status as a union member.

Neither Respondents nor amici curiae make any effort to explain away the mentioned

difficulty with the internal affairs versus interference with employment relations distinction. In tacit recognition of the failings of that distinction, however, Respondents also advert to language in Lockridge distinguishing Gonzales on the ground that Gonzales turned on interpretation of the union constitution, while Lockridge turned upon construction of the union security clause in the collective bargaining agreement, as to which the Lockridge Court said federal concern was "pervasive" (Resp. Br., p. 43). This distinction, however, ignores the fact that the expelled member in Lockridge could have maintained an action for breach of the union's duty of fair representation based on the union's abuse of the same provision of the collective bargaining agreement. Such an action would not have been preempted, as the Lockridge Court itself pointed out (403 U.S., at pp. 298-299).[8/] It is difficult to see how it can be maintained that federal concern regarding union security clauses is "pervasive" when a lawsuit sounds in contract, as did Lockridge, but not when the same lawsuit, based on essentially the same operative facts and involving the same provision in precisely the same way, is prosecuted on a theory of breach of duty of fair representation. (See Cox, Labor Law Preemption Revisited, supra, 85 Harv. L.Rev.

8/ The fact that the suit might have failed for lack of proof of hostile motivation on the part of the union (see 403 U.S., at p. 300 is a wholly different matter. The lawsuit, even if not successful, would still not have been preempted.

at pp. 1370-1371.)

Precisely because the above distinctions between Gonzales on the one hand and Borden, Perko and Lockridge on the other are so unsatisfactory and because Gonzales has not been expressly overruled by this Court, Petitioner suggested in his opening brief that there existed other grounds on which the differences in result might be explained and he urged that these same grounds served to distinguish this case from Borden, Perko and Lockridge as well (Pet. Op. Br., pp. 68-73). Both Respondents (Resp. Br., pp. 49-51) and the Board (NLRB Br., pp. 42-44) dispute the suggested distinctions.

The first distinction -- that the conduct in Borden, Perko and Lockridge might be deemed either protected or prohibited, with the consequence that those cases posed issues peculiarly appropriate for the exercise of the Board's expertise in national labor policy, while the conduct in Gonzales and this case was by no means protected, and was either prohibited or arguably prohibited in the limited sense that it might be outside the Board's power to prohibit it (Pet. Op. Br., pp. 69-70) -- is challenged on the basis that the conduct herein could indeed have been found protected (Resp. Br., pp. 49-50; NLRB Br., p. 42). But as has been seen (see Section IIAI above), this contention assumes Respondents' version of the facts, which is a far different version from that necessarily found by the jury.

Petitioner's second distinction -- that the interference with existing job rights in Borden, Perko and Lockridge was different in kind from the pure referral discrimination in Gonzales and in this case,[9] and that Congress, if it meant at all to reach the latter form of discrimination, must have regarded regulation of such discrimination as of peripheral importance at most (Pet. Op. Br., pp. 71-72) -- has met with denials but no reasoned response (Resp. Br., p. 50; NLRB Br., p. 43). This distinction finds substantial support not only in the terms of Section 8(b)(2) and the legislative history of that section but also in the language of the Gonzales decision itself, as has already been discussed in Section IIA2 and need not be reiterated here.

Petitioners' third distinction -- that the Board could have provided the same relief as did the courts in Borden, Perko and Lockridge, while in Gonzales and in this case it could not -- is attacked by Respondents and the Board as wrong on the facts and wrong on the law as well (Resp. Br., pp. 50-51; NLRB Br., p. 43).

As regards facts, it is pointed out that the state court in Borden had awarded a minute amount of punitive damages and that the state court in Perko possibly awarded damages for prospective as well as for past loss of earnings. But the negligible award of punitive damages in Borden is beside the point. As will appear from a reading of the entire passage of which Respondents quote only a part (Pet. Op. Br., p. 72) Petitioner urged simply that in Gonzales

and this case, the Board lacked the power even to to make the plaintiff whole, while in Borden, as well as Perko and Lockridge, the compensatory relief allowed by the state courts was essentially what could have been obtained from the Board. As to Perko, it may or may not be that the damages awarded there encompassed loss of future earnings, as the AFL-CIO is frank to admit (AFL-CIO, p. 4). The original judgment, which was reversed upon appeal, had included such future earnings, but it is unclear whether the smaller sum awarded on retrial did the same. In any event, the distinction between back pay and future earnings is hardly one of substance. Had the plaintiff in Perko been the victim of further misconduct following an initial Board award of back pay, he could have returned to the Board for a new award of additional back pay.

As regards the law, Respondents assert that in adverting to forms of relief rather than forms of conduct, Petitioner ignores the square holding of Garmon that it is conduct and conduct alone which determines the crux of the action (Resp. Br., p. 51). What this argument overlooks is that that holding must be read as qualified by this Court's later clear pronouncement in Linn v. Plant Guard Workers, 383 U.S. 53, 63-64 (1966) that the Board's inability to provide effective redress for harms flowing from conduct which may be partly within Board competence is indeed a factor to be considered in determining whether an action involves matters of peripheral federal concern.

4. If the foregoing distinctions -- both those offered by Respondents and those tendered by Petitioner -- have a less than genuine ring to them, it is because Gonzales embodies a different view as to the proper distribution of power as between the federal government and the states than do Borden, Perko and Lockridge. In recognition of that fact, Petitioner attempted in his opening brief (see pp. 73-83) to show that Gonzales, more nearly than Borden, Perko and Lockridge, represents the balance which Congress meant to strike between state and federal power to redress union misconduct toward members. The crucial indication of Congress' intent, Petitioner suggested, was to be found in the Labor Management Reporting and Disclosure Act.

The significance of the Labor-Management Reporting and Disclosure Act in this regard cannot be too much emphasized. The bare existence of its savings provisions (see 29 U.S.C. §§ 413, 523(a)) establishes that Congress believed state remedies like those it was enacting had survived passage of the Labor-Management Relations Act, for there would not otherwise have existed any need to preserve such state remedies from the preemptive effect of the Labor-Management Reporting and Disclosure Act itself. The legislative history of those provisions is even more revealing. It shows that the provisions were a response to arguments of opponents of the new legislation that it would wipe out the even broader remedies (exemplified by Gonzales) already provided by state law (see Pet. Op. Br., pp. 74-77). It thus establishes a congressional consensus that such broader remedies did in fact

still exist and a congressional intent that they be preserved even to the extent that they provided greater protection to union members than the new legislation. Since this case, like Gonzales, plainly lies within the scope of the Labor Management Reporting and Disclosure Act (see Pet. Op. Br., pp. 96-108) and since even if it did not, it would incontrovertably come within the more extensive protections afforded by the body of state law (see Pet. Op. Br., pp. 77-83) which Congress indicated its desire to preserve, the conclusion inescapably follows that to hold this action preempted would not only not effectuate the congressional intent, but would run counter to it.

Significantly, neither Respondents nor the Board have uttered a word in reply to the foregoing points, thus evidently conceding the correctness of Petitioner's analysis. The AFL-CIO does attempt to explain away the Labor-Management Reporting and Disclosure Act (AFL-CIO Br., pp. 25-27), but without notable success. Neither Petitioner nor Mr. Justice White in his dissent in Lockridge (403 U.S., at pp. 321-323) suggest that the savings clauses roll back Garmon or extend Gonzales, as the AFL-CIO seems to believe (AFL-CIO Br., p. 27, fn. 23). The significance of those clauses and their legislative history lies in the fact that they constitute the clearest possible expression of Congress' own view as to the preemptive effect of the Labor-Management Relations Act.

The Labor-Management Reporting and Disclosure Act will be further discussed below.

5. Respondents and the Board also challenge Petitioner's reliance (Pet. Op. Br., pp. 56-63) on Linn v. Plant Guard Workers, supra, 383 U.S. 53 (Resp. Br., pp. 51-60; NLRB Br., pp. 36-39). Several of their points require reply.

a. Although neither Respondents nor the Board are particularly clear on the subject, it would appear that both wish to reason from language in Linn clearly declaring a new application of the exception for matters of peripheral federal concern to the conclusion that the case involves no exception at all. But Linn plainly does involve an exception to the Garmon principle and a far more significant one than they seem willing to admit.

In Linn the conduct in issue was a libelous statement by a union about management representatives published in the course of an organizing campaign and quite evidently meant to affect the outcome of that campaign. It can hardly be contended that organizing campaigns do not lie at the very heart of the scheme of regulation Congress established to bring a measure of peace to the process of employee self-organization. Indeed, nothing could come nearer the central aim of the federal legislation. The deleterious effects of excessive state intrusion into the process of employee self organization need scarcely be detailed, yet this Court saw little danger in permitting a libel suit by the maligned manager, so long as his action satisfied certain federal standards designed to minimize its potential for interference with the Board's jurisdiction.

b. It was Petitioner's position in his Opening Brief that the rationale of the Linn decision -- that the conduct there in question was reckless or intentional and did not in and of itself constitute an unfair labor practice, that the Board looks to separate and severable consequences of such conduct and that the Board lacks the power to provide effective redress to the affected individual -- was equally applicable to other varieties of tort action, including this one (Pet. Op. Br., pp. 56-57).

Respondents maintain that what Petitioner perceives to be the Linn rationale is not satisfied here because the conduct in question is in their view an automatic unfair labor practice (Resp. Br., p. 59). This argument is devoid of merit.

As already indicated above (Sections IIB2b and IIB3) and in Petitioner's Opening Brief (pp. 25-28, 49-51, 71-72) the conduct herein defies such facile classification. Indeed, when the instant case is compared with Linn, it is readily seen to be no less strong a case in this regard than Linn itself. Theoretically, the publication of libelous statements in Linn might have been found not to have violated Section 8 because at least arguably it did not spring from the requisite intent to coerce or mislead (383 U.S., at p. 63). On the other hand, it was equally arguable that the statements did violate Section 8, and the Linn Court plainly assumed the possibility that the Board, if asked to adjudicate the labor related aspects of the controversy might find the statements unlawful (383 U.S., at pp. 63-64, 66-67). Likewise here. If the

conduct herein is arguably within Section 8(b)(2), it is no less arguably outside that section since its motivation was in large measure unrelated to the encouragement of union membership and since the kind of hiring hall discrimination involved here is evidently not among the evils Congress was concerned to strike at when it enacted Section 8(b)(2).

c. Both Respondents (Resp. Br., p. 54, fn. 18) and the Board (NLRB Br., p. 38) suggest that the tort of intentional infliction of emotional distress somehow affects less compelling local interests than does the tort of libel, apparently because the former tort is of more recent vintage than the latter. But the fact that the tort of intentional infliction of emotional distress can not trace its lineage to the time of Henry IV and did not arrive at these shores on the Mayflower says nothing about the intensity of the state interest in preventing its commission or redressing its effects once it is committed. Times change and with them the law. Moreover, even assuming arguendo that this tort touches to a lesser extent upon local feeling and responsibility than does libel, so does it touch to a lesser extent upon matters clearly within the central aim of the Labor-Management Relations Act. Organizing campaigns are infinitely more closely bound up with the process of employee self-organization than is the operation of hiring halls, and Congress' concern with the regulation of the former is many times stronger than its concern with the latter.

C. RESPONDENTS' CONDUCT VIOLATED BOTH THEIR DUTY OF FAIR REPRESENTATION AND THE PROVISIONS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT. WHETHER OR NOT THE JUDGMENT CAN BE DIRECTLY SUSTAINED ON THESE THEORIES, THE CASES DECIDED UNDER BOTH THEORIES ESTABLISH THAT THE CONDUCT HEREIN IS OF MERELY PERIPHERAL CONCERN TO THE FEDERAL SCHEME OF LABOR RELATIONS REGULATION.

In his opening brief, Petitioner argued that since the conduct herein came within recognized exceptions to the Garmon rule for actions based on breach of the duty of fair representation or on violations of the Labor-Management Reporting and Disclosure Act, adjudication of this lawsuit by California's courts, even though those courts applied state law, could not be seen as posing any serious threat to the Board's implementation of national labor policy. He also suggested that even though the case had been tried under state law, the pleadings stated facts sufficient, if proved, to support recovery on either theory (Pet. Op. Br., pp. 84-85), that the

jury's favorable verdict on the evidence adduced and the instructions given necessarily included favorable findings on all but one of the material issues (Pet. Op. Br., pp. 85-89, 95, 104), and that there was every indication that if the remaining issue had actually been before the jury Respondents could not have prevailed on it (Pet. Op. Br., pp. 89-91, 105).

In their reply, Respondents concentrate virtually all of their fire on the second argument, characterizing it as an attempt to smuggle into the case issues not fairly comprised within the question which this Court granted certiorari to review, and arguing that Petitioner has failed to show how and where these issues were raised by him in the state courts and how they were there resolved (Resp. Br., pp. 61-63). Respondents also maintain that to uphold the judgment on either theory would deny them due process of law since the jury did not have the opportunity to pass upon the defenses Respondents might have offered had the case actually been tried on those theories (Resp. Br., pp. 64-69).

These contentions are wide of the mark.

a. The short answer to Respondent's jurisdictional challenge is that the issue presented for decision by this Court -- in substance, whether Petitioner's lawsuit ought to be deemed preempted (Pet. Cert., pp. 2-3) -- is entirely broad enough to encompass the grounds of affirmance now under consideration. Moreover,

as Respondents ought to be well aware, the contention that the verdict may be upheld on theories of violation of the Labor-Management Reporting and Disclosure Act and of breach of the duty of fair representation was advanced in both the Court of Appeal (see Petitioner's Resp. Br., pp. 48-62) and in the California Supreme Court (see Pet. Hg., pp. 25-32) and was rejected for reasons which neither court chose to express.

b. As to Respondents' due process argument, the idea of testing the verdict against theories other than that on which the case was tried is scarcely original with Petitioner. As a matter of fact, exactly this approach was taken in Lockridge, where, although the lawsuit had been tried and affirmed on appeal on a breach of contract theory alone, this Court evidently saw nothing to preclude it from considering whether the judgment of the state court could be upheld on duty of fair representation grounds (403 U.S., at p. 299).

Respondents to the contrary notwithstanding (Resp. Br., pp. 64-69), Petitioner has not urged that simply because his pleadings alleged facts which would support recovery under either of the two theories here under consideration, he is entitled to affirmance of the judgment on those theories. Petitioner's argument involves two steps, not one, just as the Lockridge Court's examination of the applicability of duty of fair representation law involved two steps rather than one.

In Lockridge, this Court first looked to the complaint to see if it could be construed to assert a claim for breach of the union's duty of fair representation. Petitioner did precisely the same in his Opening Brief (see pp. 84-85) and that was obviously his sole purpose in referring to the pleadings.

Once having concluded that the complaint could be construed as stating a cause of action for breach of the duty of fair representation, the Lockridge court then examined the evidence to see if it would support favorable findings on the material issues and determined that it would not (403 U.S., at p. 300). It is at this point that Petitioner's analysis of the instant case diverges from the analysis in Lockridge, it being Petitioner's view that the verdict herein necessarily disposed of virtually all of the issues arising under either theory in a manner favorable to Petitioner, and that as to the single remaining issue -- whether Petitioner had exhausted his internal union remedies -- Respondents not only failed to introduce any evidence which would have warranted a finding in their favor (even though they had every motive and opportunity to do so) but in all probability could not have produced such evidence, in light of their concessions in the course of discovery (see Pet. Op. Br., pp. 89-91, 95-96). While Respondents maintain that they could have introduced further evidence, both on this issue and other unspecified issues as well (Resp. Br., pp. 67-68) it is significant that they have failed to provide even the remotest hint as to the nature of that evidence. The fact is that essentially the same evidence was

relevant under all applicable legal theories and that, irrespective of legal theories, both sides produced all of the evidence they could come up with which might in any way aid their respective causes, as the voluminous record herein clearly demonstrates.

c. In any event, it was not Petitioner's sole purpose or even his primary purpose to establish that the judgment herein could be directly upheld on the subject theories. Indeed, his main point was that the precise conduct herein had been expressly exempted from the operation of the Garmon rule in cases decided under both of those theories (Pet. Op. Br., pp. 84, 85-89, 96-104) and that there was therefore no reason to preclude state courts from providing identical remedies under state law. As already noted, Respondents have scarcely bothered to reply to this branch of Petitioner's argument. To the extent that they have replied, their contentions not only fail to aid them, but actually further Petitioner's cause. The Board's supporting arguments are hardly better.

(1) In one footnote (Resp. Br., p. 61, fn. 20) Respondents seem to suggest that even though duty of fair representation law and the Labor-Management Reporting and Disclosure Act create federal causes of action to which Garmon has been expressly held not to apply, it does not follow that state tort law addressed to identical conduct should also be excepted from Garmon.[10/]

10/ (See p. 40.)

But this is patently incorrect. In the first place, as had already been seen (see Section IIB3, supra), the savings provisions of the Labor-Management Reporting and Disclosure Act (20 U.S.C., §§413, 523(a)) make it abundantly clear that Congress meant longstanding state remedies to coexist with the new federal remedies embodied in that legislation. Secondly, if the touchstone of preemption is in fact the nature of the conduct involved, as Respondents insist when it suits their purposes (see Resp. Br., pp. 51, 54-55; cf. Resp. Br., p. 43) it is difficult to see how it can matter whether it is state law or federal law which is applied to conduct as to which it is obvious that the concern of the Labor-Management Relations Act is tangential at most.

In the same footnote, Respondents try to explain away the exceptions in question on the ground that when a court determines that conduct violates the duty of fair representation or the Labor Management Reporting and Disclosure Act, that determination is irrelevant to the

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10/ In the course of this argument, Respondents assert, incrediby, that "both exceptions result from deliberate Congressional judgments to create independent causes of action which may be maintained in the courts. . ." While this is true as to the Labor-Management Reporting and Disclosure Act, it is not of the duty of fair representation, which is a creature of the courts (see Pet. Op. Br., pp. 85-86).

legality of conduct under the Labor-Management Relations Act. This observation proves too much, for Respondents fail to explain how a determination that the identical conduct amounts to a tort under state law is any more relevant to the issue of its legality under federal labor relations law. As a matter of fact, Linn justified an exception for malicious libel on the basis that a determination that statements were libelous would be essentially irrelevant to whether they were also violative of federal labor relations law (383 U.S., at pp. 63-64).

(2) In a second footnote (Resp. Br., p. 66, fn. 21) Respondents seem to argue that hiring hall discrimination cannot amount to a breach of the duty of fair representation, even though it constitutes a breach of the collective bargaining agreement, because when a union operates a hiring hall its authority to do so derives not from its status as exclusive bargaining representative, but from the collective bargaining agreement itself.

But this is sheer sophistry. The authority which the union enjoys under the collective bargaining agreement is the direct product of its exercise of its powers as exclusive bargaining agent.

Inexplicably, Respondents go on in the same footnote to urge that "[i]n that situation the union is responsible for the hiring decision and the employer is not implicated at all." Why the employer needs to be implicated in a breach of the duty of fair representation in

order for the union to be liable therefor is not explained. Moreover, a necessary corollary of this contention is that Section 8(b)(2), which as has been seen applies by its own terms only to union instigation of employer discrimination, does not forbid pure hiring hall discrimination. For if a union which unilaterally denies a hiring hall referral does not implicate the employer who has delegated the hiring function to it, the union can hardly be said to have caused the employer to discriminate in any way, shape or form. This is of course exactly contrary to Respondents' contention that Section 8(b)(2) does forbid pure hiring hall discrimination (see Resp. Br., pp. 45-49). Obviously Respondents cannot have it both ways.

This same footnote constitutes the only attempt Respondents make to deal with the authorities cited by Petitioner (see Pet. Op. Br., pp. 85-89) to demonstrate that the misconduct herein constituted a breach of Respondents' duty of fair representation, and even then it purports to distinguish only two of the cases. Richardson v. Communications Worker of America, 443 F. 2d 974 (8th Cir., 1971), which involved a protracted campaign of harrassment and a union procured discharge growing out of the plaintiff's opposition to misuse of union funds, is dismissed on the ground that it arose on extreme facts and is "to that extent completely inconsistent with the underlying theory of the duty." This delphic pronouncement, which is not further explained, states no cognizable distinction at all. Smith v. Sheet Metal Workers, 500 F.2d 741 (5th Cir., 1974), which involved hiring hall discrimination

like that herein, is said to be erroneous because it held that a duty of fair representation claim need not be founded on a breach of the collective bargaining agreement, a contention specifically refuted by Lockridge (403 U.S., at p. 299), and because the question of the union's duty to fairly represent members of the bargaining unit in the operation of the hiring hall was not squarely posed and decided therein, an argument refuted by examination of the opinion itself (500 F.2d 473-475).

(3) Curiously, Respondents do not devote even a footnote to Petitioner's discussion of the authorities decided under the Labor-Management Reporting and Disclosure Act (see Pet. Op. Br., pp. 96-105), even though the terms and legislative history of the Labor-Management Reporting and Disclosure Act provide the most potent possible indication that Congress meant to preserve state law addressed to the same conduct and did not intend the Labor-Management Relations Act to confer on the Board the exclusive power to regulate such conduct.

It bears observing that the Labor-Management Reporting and Disclosure Act is all the more significant here in light of Respondents' adamant insistence -- in order to bring this case within Section 8(b)(2) -- that the motivation for the misconduct herein was purely Petitioner's opposition to business agent Daley and his policies (Resp. Br., pp. 38, 53, 59-60). For to the extent that Respondents are correct in this regard, this case falls even more squarely within the provisions of the Labor-Management

Reporting and Disclosure Act. There is no need to reiterate here the copious authority cited in Petitioner's opening brief to establish that retaliation for exercise of the right to speak out about union affairs violates the Labor-Management Reporting and Disclosure Act and may be the subject of a wide range of remedies, including damages for mental anguish and punitive damages. To that authority need only be added two recent decisions: Miller v. Holden, 535 F. 2d 912 (5th Cir., 1976) [which establishes that union procural of a member's discharge from his job does represent "discipline" within the meaning of Sections 101(a)(5) and 609 of the Labor-Management Reporting and Disclosure Act where the member's employment status is related to some internal union function, such as a hiring hall (or conversely, a union blacklist) and that even when the union's interference with the employment relations of a member does not qualify as "discipline" within the meaning of those sections, it may still "infringe" the member's rights within the meaning of Section 102] and Morrissey v. Maritime Union, 79 L.C., para. 21,406 [which, in affirming Morrissey v. National Maritime Union, 397 F. Supp. 659 (S.D.N.Y., 1975) cited at page 108 of Petitioner's opening brief, adds the Second Circuit to a growing number of circuits recognizing the right to punitive damages in Labor-Management Reporting and Disclosure Act actions].

D. TEAMSTERS LOCAL 20 v. MORTON PROVIDES A RULE OF DECISION SUPERIOR TO THE GARMON PRINCIPLE. APPLIED TO THIS CASE, THE MORTON RULE PLAINLY PERMITS THE MAINTENANCE OF THIS ACTION. WHOLLY APART FROM MORTON, DISPUTES BETWEEN MEMBERS AND THEIR UNION OUGHT TO BE EXEMPTED FROM THE OPERATION OF GARMON.

In his opening brief, Petitioner suggested that if this lawsuit were in fact preempted under existing law, it was time to take another look at the law for reasons both of justice and ease of administration. Petitioner argued that a better test than that stated in Garmon for deciding whether state law is preempted in any particular case was the rule suggested by Professor Archibald Cox in his article Labor Law Preemption Revisited, 85 Harv. L.Rev. 1337 (1972) and derived from Teamsters Local 20 v. Morton, 377 U.S. 352 (1964): Whether the rule of state law law sought to be invoked is an attempt to accommodate the same conflicting interests of employees, unions, employers and the public which Congress weighed when it enacted the Labor-Management Relations Act, or whether that rule is unrelated to labor relations as such (Pet. Op. Br., pp. 120-124). In the alternative, Petitioner

urged abandonment of Garmon in the limited area of member-union disputes and a return to the more even balance between state and federal power represented by Gonzales, a balance which is implicit in the limited concerns of the Labor-Management Relations Act and which Congress expressly indicated its desire to preserve when it enacted the Labor-Management Reporting and Disclosure Act (see Section IIB4, above; Pet. Op. Br., pp. 115-120).

In reply, Respondents maintain that Garmon is soundly reasoned (although they do not indicate why they so believe) and that Garmon was in any event tacitly approved by Congress in 1959 when it added Section 14(c) to the National Labor Relations Act (29 U.S.C. §164(c)). Respondents further argue that Morton and Garmon are not inconsistent and that in fact Morton, no less than Garmon, requires that the instant action be deemed preempted (Resp. Br., pp. 69-77). The AFL-CIO advances a more elaborate version of the contention that enactment of Section 14(c) constituted an approval of Garmon (AFL-CIO Br., pp. 6-24) and likewise suggests that Morton precludes the maintenance of the instant action no less than does Garmon (AFL-CIO Br., pp. 39-40).

These arguments are unmeritorious, for the following reasons:

1. Section 14(c) was a legislative attempt to resolve a far different problem than that presented here. As the AFL-CIO's copious quotations from the legislative history of Section 14(c) make plain, the sole issue under

consideration by Congress was whether the states should be free to resolve labor-management disputes refused by the Board not because they involved substantive issues only marginally within Board competence but because they involved employers not sufficiently engaged in interstate commerce to meet Board jurisdictional standards. That issue arose out of this Court's decision in Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957). Not under consideration was the wholly distinct "no-man's land" arising under Garmon when the Board declines to adjudicate a labor-management dispute in an industry clearly affecting interstate commerce and the courts also refuse to touch it because the dispute might arguably be within Board competence. Likewise not under consideration was the problem of union-member disputes.

The most that can be said about Section 14(c) is that it represents Congress' partial solution to the former of the two "no-man's lands" just described. That partial solution to that limited problem was hardly an endorsement even of Guss. Even less was it an endorsement of Garmon, and still less of Borden, Perko and Lockridge.

It is true, as revealed by portions of the legislative history adverted to by the AFL-CIO in its brief (see p. 21), that the Garmon decision was handed down while Section 14(c) was under deliberation and that Congress was unquestionably aware of the decision. But because Garmon did not concern the same "no-man's land" as that on which Congress' attention was concentrated,

the failure of Congress to respond to the distinct problems raised by Garmon cannot be construed as a legislative approval of that decision. Moreover, since there was not the slightest clue in the Garmon decision (which, it must be emphasized, concerned a union-employer lawsuit) suggesting that the Garmon formula would be extended to member-union disputes in this Court's subsequent decisions in Borden, Perko and Lockridge, such approval of Garmon as might be found in congressional inaction regarding that decision cannot properly be said to apply to those later decisions. In fact, since Garmon cited with evident approval the then recent decision in Gonzales, congressional approval of Garmon logically entails approval of Gonzales as well. And in any event, if inaction alone constitutes legislative approval, Congress' failure to overturn Gonzales must be construed as direct approval of that decision.

2. Largely ignoring the logic of the Morton formula suggested by Professor Cox and concentrating principally on other aspects of Morton, Respondents urge that Morton precludes the instant lawsuit because it forbids use of state law to supplement Board remedies.

But Morton does not have the effect Respondents claim for it.

Morton grew out of secondary boycott activity violative of Section 8(b)(4). The victim thereof sued in federal court for compensatory damages under Section 303 of the Labor-Management Relations Act (29 U.S.C. §187), and

appended a further claim for compensatory and punitive damages under state law of secondary boycott, which to some extent purported to regulate conduct left unregulated by federal law.

This Court reversed the award of compensatory damages rendered under state secondary boycott law because Congress in reaching an accommodation of the various interests of the various parties to such activity had focussed upon but left unregulated the conduct to which such state law was addressed (377 U.S., at pp. 258-260). It is this portion of Morton on which Professor Cox' proposed preemption formula is based, and which Respondents decline to discuss.[11/]

This Court also overturned the award of punitive damages on the ground that both the language and the legislative history of Section 303 revealed Congress' intent that only compensatory damages be awarded for violation of that

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11/ Respondents' silence on the merits of the Cox-Morton formula is all the more surprising in light of their express recognition (Resp. Br., p. 71, fn. 27) that several members of this Court have suggested a willingness to adopt that approach. (See concurring opinion of Mr. Justice Powell in Machinists v. Wisc. Emp. Rel. Bd., ___U.S.___, 92 LRRM 2881, 2884-2890 and concurring opinion of Mr. Chief Justice Burger in Taggart v. Weinacher's, Inc., 397 U.S. 223, 227-229 (1970).)

section (377 U.S., at pp. 260-261). It is this second portion of Morton on which Respondents rely.

The parallel between the punitive damages award overturned in Morton and the damages, both punitive and compensatory, allowed here is too imprecise, however, to justify the conclusion Respondents would draw. While the Board may not award the kinds of damages awarded here, the limitations on Board relief can hardly affect lawsuits only remotely touching on the Board's primary concerns in the same way federal limitations on damages in suits founded on federal law of secondary boycott affect damages awards under state law of secondary boycott. Not only are state and federal concerns more nearly congruent in the latter than in the former situation -- a fact which militates more strongly in favor of preemption -- but Section 303 constitutes a direct expression of a federal policy against awarding punitive damages in a lawsuit for unlawful secondary boycott activity, an expression which has no counterpart with respect to this kind of case. In fact, this Court's decision in Linn, and the decisions allowing a wide range of remedies (including damages for emotional suffering and punitive damages) in suits for breach of the duty of fair representation and violation of the Labor-Management Reporting and Disclosure Act (see Section II C, supra; Pet. Op. Br., pp. 91-95, 105-111) amount to a recognition of a contrary federal policy with respect to suits like this one.

3. Respondents (Resp. Br., pp. 70-71) and both amici curiae (AFL-CIO Br., pp. 4-5; NLRB Br., p. 47) argue that since Professor Cox suggests in a footnote that while he would overrule Lockridge, Borden and Perko might still be retained (85 Harv. L.Rev., at p. 1376, fn. 174), Petitioner would be no better off if this Court adopted Professor Cox' approach than under existing law.

This contention is meritless.

a. It is a peculiarity of the Cox article that having formulated a comprehensive new labor law preemption principle, Professor Cox declined to apply the new principle as fully to disputes growing out of internal union affairs as to true labor disputes. In fact, for reasons not altogether clear to Petitioner, he may not have meant it to apply to member-union disputes at all. (See 85 Harv. L.Rev., at p. 1359.)

Petitioner submits, however, that if under the Cox-Morton approach a rule of state tort law not aimed at the regulation of employee self-organization or collective bargaining as such can be applied to conduct which is not protected by federal law in a lawsuit between an employer and a labor organization (see Professor Cox' discussion of United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954) at 85 Harv. L. Rev., 1358), there is logically no reason why a rule of state tort law likewise based on something other than local notions of sound labor policy should not be similarly applied to member-union members. Extended into this

area, the Cox-Morton principle would permit an injured member relatively full resort to state law of general application for harms done him by his union, except insofar as the union's conduct were actually protected. Obviously, there is no place in a world of which the expanded Cox-Morton principle is a part for such a distinction as that between torts accompanied by wrongful expulsion and torts not so accompanied.

b. In any event, even on the more limited approach which Professor Cox appears to have taken toward member-union disputes, it still must be concluded that this case should not be deemed preempted.

Professor Cox' approach in this area is an evident attempt to formulate a single rule which will take into account Congress' dual purposes in enacting Sections 8(a)(3) and 8(b)(2). On one hand, he points out, maintenance of membership agreements may be used as an organizing tool, in which case they impinge directly on employee self-organization. On the other, they may be used to enforce internal discipline, in which case their impact on employee self-organization may be remote at most. While Congress intended to reach both uses of such provisions, Professor Cox suggests, only cases involving predominantly the former use require preemption of state remedies. But since many cases contain elements of both, he reasons, a rule is needed which balances competing pro-preemption and anti-preemption policies (85 Harv. L.Rev., at pp. 1373-1374).

The rule proposed by Professor Cox is that state courts be permitted not only to reinstate expelled members but to award damages for resulting loss of employment. More significant than the bare rule, however, are the reasons he gives for adopting it. First, allowing a state court to award damages for loss of employment following expulsion poses no threat to national labor policy, he indicates, because such an award, even where it redresses different harms and is larger than a Board award of back pay, does not affect the balance of power between management and labor.12/ (Id. at p. 1374.) This same reasoning applies no less clearly when the member is not expelled. Second, there is scant danger of different findings of fact or interpretations of relevant documents when a court awards damages in a suit for reinstatement. (Id.) This same reasoning applies equally when there is no expulsion. Third, the Board is simply not as concerned with individual injustice as it is with labor-management relations, and relief in the courts is likely to be quicker and more certain. (Id.) Plainly, the Board's concern is no

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In this regard, Professor Cox observes that "[s]urely the day has passed when unions may fairly say that they must be immune from paying damages lest such payment threaten their ability to function effectively. Nor is there other reason to suppose that Congress intended to limit the remedies available to the individual against the union." (85 Harv. L.Rev., at p. 1374.)

greater where no expulsion occurs, nor is Board relief any more likely to be as speedy or as reliable as a lawsuit.

It is against this rather expansive justification of a resurrected Gonzales exception that Professor Cox' observations about the possibility of continuing adherence to Borden and Perko must be viewed.

In suggesting that Borden and Perko might be retained, Professor Cox adverts not once but twice to the fact that the Board could handle the "whole controversy" in those cases and cases like them. Because Professor Cox is expressly concerned with the problem of injustice to the individual, these references appear to signal his belief not only that all substantive aspects of those controversies were within Board competence, but also that Board remedies would be adequate to make whole the involved members. Since the reasons he gives for permitting state courts to award damages in expulsion cases apply as well to cases in which there has been no expulsion and since he points to no overriding consideration which would require preemption in the latter cases, it is reasonable to assume that he would not require preemption in non-expulsion cases in which, as here, the Board's limited remedial powers would be inadequate to effect substantial justice.

III

CONCLUSION

For the foregoing reasons, it is urged that the writ of certiorari not be dismissed, that the decision of the Court of Appeal be reversed and that Petitioner's claim be held within the jurisdiction of the courts of the State of California.

Respectfully submitted,

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